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Supreme Court, U.S.
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No. 93-160

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT HAWKINS, PAMELA HAWKINS, RASHAWN HAWKINS, RODERICKA HAWKINS, RYAN HAWKINS, and ROBERT HAWKINS, JR.,
Petitioners,

vs.

PEOPLE OF THE STATE OF MICHIGAN, ex rel JOHN D. O'HAIR, Prosecuting Attorney
Respondent

On Petition For Writ of Certiorari

RESPONDENT'S ANSWER IN OPPOSITION

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35 pp

STATEMENT OF QUESTIONS PRESENTED

I.

IS A REMAND REQUIRED WHERE: PETITIONER FAILED TO RAISE ANY EIGHTH AMENDMENT ISSUE IN STATE COURTS; THE INSTANT CASE PRESENTS A DIFFERENT THEORY OF RECOVERY THAN THAT PRESENTED IN AUSTIN; AND THE EIGHTH AMENDMENT HAS NOT BEEN HELD TO APPLY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT?

II.

WERE PETITIONERS DENIED A FAIR TRIAL ON THE BASIS OF AN ALLEGED LACK OF JUDICIAL IMPARTIALITY?

III.

IS IT IMPROPER FOR A TRIAL COURT TO DECLINE TO REVISIT A FRANKS V DELAWARE ISSUE IN A STATE FORFEITURE TRIAL WHEN THE PRECISE ISSUE WAS RAISED AND DECIDED UPON WITHIN THE CONTEXT OF A FEDERAL CRIMINAL TRIAL OF ROBERT HAWKINS?

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STATEMENT OF FACTS OF THE CASE

On May 9, 1989, a search warrant was executed at the residence of ROBERT and PAMELA HAWKINS. 5/1/90A 26-29. The warrant was based in part upon information obtained from a confidential informant named RANDY ULMER. The police recovered from the residence over one million dollars in U.S. currency. Recovered from an end table which contained a hidden compartment was approximately one-half million dollars in U.S. currency. Id. 33-35, 40. The currency was bundled in approximate $15,000 amounts. Id. 41-44. This amount was consistent with the wholesale price of a kilo of cocaine. 5/2/90 165-166. Drug ledgers were found in the master bedroom which reflected a sale of approximately sixty-nine kilos of cocaine. A travel itinerary was also found which indicated that the HAWKINS were flying to New York on May 10, 1989 in the morning and were due to return to the Detroit area later

that same day. 5/2/90 91-94; 187-195; 5/7/90 51-56. Three pieces of luggage full of the remaining approximately one-half million dollars in cash were recovered in the master bedroom. Id. at 186-187. White residue on one of the $20 bills was visible to the naked eye of the police officers. Id. 146-148; 162-164. The substance field tested positive for cocaine. All of the currency recovered from the house was fanned over a clean table and the residue was collected for chemical analysis which was found to contain cocaine. 5/1/90A 41-44; 5/3/90 18-31, 85-126.

Located in the house were numerous safes including a pedestal column with a safe hidden in the bottom of the column. 5/2/90 175-179. PAMELA HAWKINS also rented a safe deposit box at a location called the Depository; the rented safe's dimensions

were approximately four feet in length and two or three feet in depth. 5/3/90 34-38.

The jewelry recovered from the master bedroom of the house had an estimated worth of over $100,000. 5/2/90 195-202; 5/7/90 35-39. The remaining defendant items were also taken which included a Tiffany, Bayliner Boat, Rolls Royce, Jeep, Jaguar, Dodge and Lincoln as well as thousands of dollars in various bank accounts.

ROBERT HAWKINS worked at Chrysler Corporation in the capacity of a factory worker. PAMELA HAWKINS worked on and off on a part time basis.

ROBERT HAWKINS was prosecuted in the federal system with narcotic violations. The confidential informant, RANDY ULMER, testified on behalf of the federal government at the criminal trial. ROBERT

HAWKINS was convicted and sentenced to approximately thirty years imprisonment. His conviction has been affirmed in the federal system. A civil narcotic forfeiture action was filed at the state level pursuant to MCLA 333.7521, et seq. ROBERT HAWKINS and PAMELA HAWKINS testified. Also testifying on behalf of the government was the confidential informant, RANDY ULMER.

The forfeiture trial began on May 1, 1990. Testimony was taken on May 2, May 3. The trial was adjourned from that Thursday to the following Monday, May 7, 1990. Testimony was taken on May 8, 9 and 10. The trial was then continued until May 15, 1990. The trial was then adjourned until July 16, 1990.

Testimony was presented concerning the net worth of the HAWKINS. 7/16/90

11-68. The HAWKINS' assets for the listed years were the following:

$ 179,987 for 1983
$ 207,353 for 1984
$ 799,182 for 1985
$1,475,542 for 1986
$2,140,517 for 1987
$2,277,620 for 1988
$3,450,582 for four months in 1989. Id. 19-41.

Testimony also established the lavish spending habits of the HAWKINS. PAMELA HAWKINS had a common practice of purchasing large money orders under the $10,000 federal reporting requirement and depositing them into various banks on a regular basis. Many luxury items were purchased including trips, numerous automobiles, jewelry, real estate, extravagant parties. 5/9/90 140-160. When the network was put together by the accountants, they decided that they would not include as a factor any normal "cost of

living" 7/16/90 22-43. There was insufficient legitimate income to support the majority of the assets. Id. Between December 31, 1983 and May 9, 1989, income from unknown and unexplainable sources was $2,708,156.00. 7/16/90 22-43.

The Government called as witnesses ROBERT HAWKINS and PAMELA HAWKINS. The confidential informant, RANDY ULMER, also testified.

The defense proffered at the forfeiture trial was that the money and all of the assets were the result of income generated from a lawsuit settlement. PAMELA HAWKINS claimed that a woman named MARGARET WILSON came to Mrs. HAWKINS' residence for purposes of selling an insurance policy. MARGARET WILSON became irate and assaulted PAMELA HAWKINS who happened to be in the very early stages of a pregnancy. PAMELA

HAWKINS testified that her doctor told her the fetus she was carrying was killed and an abortion was necessary. 5/9/90 172-173. PAMELA HAWKINS was impeached because of her conflicting testimony surrounding the reasons for the abortion. After impeachment, PAMELA HAWKINS indicated that the doctor never recommended the abortion. Prior to her impeachment, PAMELA HAWKINS was insistent that the doctor informed her the fetus was dead and that an abortion was necessary. 5/9/90 172-173; 7/17/90 20-30. The doctor was produced at the trial but PAMELA HAWKINS asserted the doctor/patient privilege. Even though PAMELA HAWKINS testified concerning her medical examination and the "seeming" medical conclusion of her doctor, the trial court did not compel the doctor to testify at trial. 7/17/90 20-30. MARGARET WILSON did not testify at the trial nor did the HAWKINS know where she lived.

The parties stipulated to the source of the funds utilized to purchase most of the defendant properties as well as to the time of the purchases and to the tracing of the funds deposited into the various bank accounts. The source of the funds and the funds utilized to purchase the assets came from the MARGARET WILSON lawsuit. The entire court file of the lawsuit was admitted into evidence at the forfeiture trial. 7/17/90 5-19. The lawsuit was filed by attorney BRAZELL who subsequently was the subject of federal indictments for money laundering. 5/9/90 19-93, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69. BRAZELL testified that at the HAWKINS' request, BRAZELL did not participate in any settlement negotiations. Rather, negotiations were the result of two phone calls between ROBERT HAWKINS and MARGARET WILSON. 5/9/90 43. MARGARET

WILSON was never represented by any attorney. Id. After two telephone calls, MARGARET WILSON agreed to pay the sum of two million dollars in settlement of the lawsuit. Id. The two million dollar amount was decided by ROBERT HAWKINS who just came up with that amount. 5/9/90, 18, 19-93, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69.

The two million dollars was paid in cash and two of the cash payments were made at BRAZELL'S office. The first payment of $500,000 was received less than one month before the second payment of an additional $640,000. It was unclear when the third $750,000 payment was received, but that payment was also in cash. The quantity of cash was so enormous that it was necessary to make the payments in large suitcases. 5/10/90 68-69, 89, 100. The money was then deposited into BRAZELL'S client trust fund

and checks were subsequently written to the HAWKINS.

BRAZELL represented WILSON in the formation of numerous dummy corporations. Each was set up with BRAZELL acting as an officer of the corporation and as an authorized check signer. 5/10/90 98-130. Both BRAZELL and WILSON were the only authorized check signatories. 5/10/90 98-130. Each of the dummy corporations utilized a residential address which had no relationship to the corporation. 7/16/90 3-9. BRAZELL opened numerous bank accounts for WILSON in the names of WILSON APPLIANCE & HARDWARE, WILSON LIQUOR & FOOD and DEXTER WILSON GROCERY. These accounts were opened within two days of each other and each of the named accounts were opened at four different financial institutions. 5/10/90 131-147; 5/15/90 11-29.

Each of these corporate bank accounts reflected checks written to either ROBERT HAWKINS or ROBERT AND PAMELA HAWKINS. No other checks were written on any of the corporate accounts. Neither HAWKINS nor Brazell could offer a plausible explanation as to the additional check payments which amounted to some $224,000.00, although ROBERT HAWKINS confirmed his endorsement on the back of the check.

In addition, Brazell opened an account in the name of Dallas Land and Cattle on which he was the only signatory (5/10/90 130). One check was written from that account payable to Robert and Pamela Hawkins in the amount of $750,000.00. The check was endorsed by the HAWKINS but not cashed due to insufficient funds (5/9/90 86). Some of the various banks closed the numerous WILSON accounts. In each case, the entire remaining balances were deposited

into bank accounts held by the HAWKINS. All of these payments were in addition to the alleged lawsuit settlement.

The alleged WILSON lawsuit filed by BRAZELL on behalf of the HAWKINS was admitted into evidence. 7/17/90 5-19. The case was put on the no progress docket and dismissed. 7/17/90 5-19. A consent judgment was thereafter signed by the parties but not by the judge. Id. That document reflected a settlement amount of $750,000.00. Id. The HAWKINS testified, however, that they received over two million dollars which was given to them primarily in the form of cash which was allegedly brought to Brazell's office by MARGARET WILSON. 5/9/90 18, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69.

The money was kept either in the HAWKINS' house, until they went out of town

at which time the money was put into the trunk of one of their cars, and/or in various financial institutions. 5/9/90 18-93, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69.

The trial court ordered the defendant items forfeit and additionally found that the lawsuit was fraudulent and BRAZELL's testimony to be beyond comprehension. 7/23/90 21; 8/24/90 20.

REASONS FOR DENYING WRIT

I. **REMAND IS NOT REQUIRED BECAUSE: PETITIONER FAILED TO RAISE ANY EIGHTH AMENDMENT ISSUE IN STATE COURTS; THE INSTANT CASE PRESENTS A DIFFERENT THEORY OF RECOVERY THAN THAT PRESENTED IN AUSTIN; AND THE EIGHTH AMENDMENT HAS NOT BEEN HELD TO APPLY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.**

Petitioner asks this Court to remand this case for further consideration in light of this Court's ruling in Austin v United States, 509 U.S.____; ____ S. Ct. ___ ; _____ L.Ed.2d _____; 53 CrL 2274 (1993). Respondent maintains that a remand is not proper under the circumstances. First, Petitioner failed to raise any Eighth Amendment issue in the courts below. Respondent further maintains that a remand is not required because the instant case presents a different theory of recovery under the narcotic forfeiture statute than the recovery theory presented in Austin. Finally, the Eighth Amendment's prohibition

on excessive fines has not been found to apply to the States through the Fourteenth Amendment.

In its appeal to the Michigan Court of Appeals and to the Michigan Supreme Court, Petitioner did not raise any state or federal Eighth Amendment challenges to the scope of the trial court's order of forfeiture; thus, no Eighth Amendment challenge based upon the federal Constitution was passed upon in state court. It is clear that any generic reference to a claimed constitutional violation is not sufficient to preserve a constitutional claim based upon an unidentified constitutional provision.

> At the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in

> the manner required by the state law. Bankers Life & Casualty Co. v Crenshaw, 486 US 71; 100 LEd2d 62, 72; 108 SCt 1645 (1989), *citing* Webb v Webb, 451 US 493, 501, 68 L Ed 2d 392, 101 S Ct 1889 (1981).

The Crenshaw Court also cautioned that accepting an Eighth Amendment claim that was not raised in the state courts becomes especially problematic when the state Constitution contains its own Excessive Fines Clause. Crenshaw, 100 L Ed 2d, supra at 72. Michigan's Constitution reflects in pertinent part the following: "Excessive bail shall not be required; excessive fines shall not be imposed...." Const. 1963, Art 2, Section 15. Petitioner admits that the excessive fines argument was not raised below. Therefore, this Court need not consider it.

This Court also need not remand this case as a result of the Austin decision because the facts of Austin are inapposite

to the facts of the instant case. In that case, Austin brought two ounces of cocaine from the mobile home to a body shop in order to consummate a prearranged sale to another individual. The sale was accomplished and a search warrant was executed at the body shop and mobile home the following day. As a result of that warrant, small amounts of marijuana, cocaine, a weapon, drug paraphernalia and approximately $4,700 in cash was recovered. Austin pled guilty to one count of possessing cocaine with intent to distribute in the state court. A federal forfeiture Complaint was filed pursuant to 21 U.S.C. 881(a)(4) and (a)(7) which sets forth that conveyances and real property shall be forfeit if it is used to facilitate a narcotic transaction. The government sought forfeiture of the mobile home and the business which was granted by the trial court.

The facts of the instant case are inapposite because the government sought forfeiture of items which were purchased with narcotic proceeds. At trial there was a stipulation of the tracing of the money allegedly obtained from the WILSON lawsuit which was used to purchase almost all of the various defendant items. The defense proffered that the source of the funds used to purchase these items and the funds which were contained in the various bank accounts constituted the settlement from the lawsuit. These facts are distinctly different than those presented in Austin. Respondent prevailed at trial in establishing that these funds were garnered from narcotic trafficking. Without the drug money, Petitioners would not have been in possession of the over one million dollars found in their residence. The drug talley sheets supported Respondent's theory as well

as the theory that the money which was found in the suitcases were to be taken to New York in payment for the sold cocaine. There was visible cocaine residue on the money and additional cocaine residue was recovered for chemical analysis. The trial court found, affirmed by the Court of Appeals, that Respondent had met the requisite burden.

A "proceeds" forfeiture is conceptually different from a facilitating theory. By definition, proceeds do not constitute an excessive fine since the narcotic dealers are in possession of items purchased with illgotten money. "Proceeds" are traceable entirely to criminal activity. Removing criminal proceeds from a culpable owner is no different than taking bank robber proceeds from a bank robber. The culpable owner is put into the precise position he or she would be in if no crime had been committed. Therefore, a remand as

a result of Austin is not required because the forfeiture in the instant case was based primarily on a "proceeds" theory rather than a "facilitation" theory. Property forfeit because they constitute narcotic proceeds are significantly different than property forfeit because it was used to facilitate a narcotic transaction.

Finally, in order for Austin to be applicable when the forfeiture is based upon a state statute, several antecedent questions have to be answered. Austin reviewed a federal forfeiture statute. This Court has not held that the Excessive Fines Clause of the Eighth Amendment applies to the States through the Fourteenth Amendment. Browning-Ferris v Kelco Disposal, 492 US 257, 106 L Ed 2d 219, 239 fn.22, 109 S Ct 2909 (1989). Any remand, then, would be premature because the applicability of the Eighth Amendment at the state level has not yet been determined.

II. **THE PETITIONERS WERE NOT DENIED A FAIR TRIAL ON THE BASIS OF AN ALLEGED LACK OF JUDICIAL IMPARTIALITY.**

This Court should not grant the petition on this basis. Petitioners made this claim through numerous vehicles including the following: pretrial motions before the trial judge; pretrial review of the trial judge's denials before the chief judge of the Circuit Court; mid-trial motions; appeals to the Michigan Court of Appeals; application for appeal before the Michigan Supreme Court. All of the Petitioners' requests were denied.

Petitioner's primary claim rests upon an alleged showing of an "indirect financial interest" by virtue of a letter sent by the trial judge. With this argument, the Petitioner is stretching the statutory proscription against a pecuniary interest in the outcome of the case. The

Court of Appeals summarily dismissed Petitioner's claim by noting that an ambition to fight the war on drugs does not translate into the inability of the court to decide a case fairly. Michigan's narcotic forfeiture statute, MCL 333.7524a; MSA 14.15(7524a) also required the court to keep records.

Moreover, Petitioner's suggestion that a trial judge is unable to be impartial because of a reference to the "scourge of drugs" is absurd. Most people are against drugs. This is not a new concept. To accept Petitioner's logic would result in the automatic exclusion of every judge who once found a defendant guilty. The letter does not establish actual bias or prejudgment as required by Michigan court rule and case law.

The Court of Appeals properly noted that a careful review of the entire record, rather than a selective review, reveals that Petitioners were not denied a fair trial. The Court properly noted:

> After carefully reviewing the entire record in this case, we conclude that reversal is not warranted on this basis. It appears that throughout the trial the atmosphere was rather tense as a result of the bickering between counsel and between claimants' counsel and the trial court. It appears to us that claimants' counsel provoked the trial court with their comments and conduct in general. In addition to being disrespectful to the court in many instances, claimants' counsel resorted to attacking a prosecutor by apparently stating that her conduct 'typified the basest kind of projection as described in psychiatric literature.' This type of conduct was uncalled for. The trial judge also appeared to be agitated by the tactics of claimants' counsel, such as what appeared in the judge's eyes to be attempts to create appellate parachutes and reliance on what clearly appears to be a fraudulent lawsuit as an explanation for some of claimants' extensive assets. As a result, the judge was apparently becoming frustrated and was losing

his patience. In re Forfeiture of $1,159,420, 194 Mich App 134, 154; 486 NW2d 326 (1992).

Finally, Petitioner claims that there is a "conflict" with this Court's decisions and those of the lower federal courts. The cases cited by Petitioner, however, fail to support their claim. The Petitioners were not denied a fair trial on this basis.

III. **IT IS PROPER FOR A TRIAL COURT TO DECLINE TO REVISIT A FRANKS V DELAWARE ISSUE IN A STATE FORFEITURE TRIAL WHEN THE PRECISE ISSUE WAS RAISED AND DECIDED UPON WITHIN THE CONTEXT OF A FEDERAL CRIMINAL TRIAL OF ROBERT HAWKINS.**

ROBERT HAWKINS was charged criminally in the Federal court system. PAMELA HAWKINS was not charged with any crimes. The narcotic forfeiture action was filed under the state narcotic forfeiture law.

At the federal criminal trial, ROBERT HAWKINS raised an issue under Franks v Delaware, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). The affiant, Jerome Sharpe, on the search warrant testified extensively at the federal criminal trial. The affiant's information was based in part on information from a confidential informant. That confidential informant, Randy Ulmer, testified at the federal

criminal trial and was cross examined at length by the defense. At the close of the government's case, the defense requested that the items recovered from the residence of ROBERT HAWKINS be suppressed and relied upon Franks. The federal trial court denied the request after having heard all of the testimony.

Similarly, the Franks issue was raised within the context of the state forfeiture civil lawsuit. Once again, the HAWKINS requested that the search warrant be suppressed on the basis that the affidavit contained deliberately false statements or statements made in reckless disregard for the truth, a violation under Franks v Delaware, supra. Michigan has adopted federal law when similar claims are brought at the state level. People v Turner, 155 Mich App 222, 227; 399 NW2d 477 (1986), lv

den 427 Mich 854 (1986); People v Poindexter, 90 Mich App 599; 282 NW2d 411 (1979), lv den 407 Mich 876 (1980); People v Ward, 107 Mich App 38; 308 NW2d 664 (1981), lv den 417 Mich 938 (1983).

The Michigan Court of Appeals properly ruled that collateral estoppel precluded the relitigation of the Franks issue. The doctrine of collateral estoppel has long been employed throughout the judicial system and applies to criminal cases as well as civil matters. Ashe v Swenson, 397 US 436; 90 SCt 1189; 25 LEd2d 469 (1970). Application of this principle requires several findings. First, the same ultimate issues underlying the first action must be involved in the second action. Parklane Hosiery Co. v Shore, 439 US 322; 58 LEd2d 552; 99 SCt 645 (1979). The issue raised in the federal court was identical to the issue raised in the forfeiture trial.

Secondly, there must be "mutuality" of parties. Parklane, 58 LEd2d at 560. The respective litigants in the second lawsuit were parties or privy to a party to the first lawsuit. The interests of ROBERT HAWKINS in the first lawsuit were adequate to protect the interests of his wife and children. Because of the spousal relationship, ROBERT HAWKINS' interests were so closely aligned with PAMELA HAWKINS' interests as to be her virtual representative.

Most importantly, even though the trial court in the instant action declined to revisit the Franks issue in the civil forfeiture action, the underlying allegations proffered by Petitioners, that is, that there were deliberate false statements by both the affiant and the confidential informant, were presented as an affirmative equitable defense. Both the

affiant and the confidential informant were questioned at length during the forfeiture trial regarding their statements set out in the search warrant. Thus, the precise issue was nevertheless presented, argued and rejected once again by a trial court. On this basis there was no error.

RELIEF

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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